

Protest of)	Date: November 15, 1990
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CANTEEN SERVICE, INC.)	
)	
Solicitation No. 549990-90-A-0223)	P.S. Protest No. 90-68

DECISION

Canteen Service, Inc. ("Canteen") protests the award of a contract for food vending services at the Bulk Mail Facility in Federal Way, Washington under Solicitation No. 549990-90-A-0223 to Holiday Service, Inc. ("Holiday").

The solicitation was issued by the Seattle Procurement and Materiel Management Service Office on August 15, 1990, with an offer due date of September 11, 1990. The Solicitation Instructions provided, at Paragraph 8, that "[a]ward will be made to that responsive, responsible offeror whose total bid (item price and commission) is most advantageous to the Postal Service." Offers were to be evaluated as follows:

Evaluation of Offers:

In determining which offer is the most advantageous to the Postal Service, the following steps will be taken:

- (a) The unit price for each machine will be extended by the estimated quantities to reflect estimated annual sales.

NOTE: For multi-commodity machines (e.g. snacks, candy, gum, mints) which have multi-prices, for evaluation purposes only, the prices shall be averaged before making computations, Example: $.25/.45/.50 = .40$ for evaluation purposes.

- (b) Estimated annual vendes are used for evaluation of contract award ONLY. They may or may not be indicative of past usages and are no guarantee of estimated sales.
- (c) In those cases where an offeror does not submit an offer for a particular listed machine, the offer will be rejected and will not be considered for

award.

- (d) The commission(s) offered will be computed to reflect the estimated annual dollar value by multiplying estimated annual sales by percent commission offered for each machine.
- (e) Percent commission offered by machine shall remain constant for each machine quoted and shall not be offered based on sliding scale according to dollar sales volume.
- (f) While bidders must show the percent of commission offered for each machine (except for lunchroom(s) at N/A, for which no commission is payable), it is not necessary that this number be greater than 0 for each and every machine. The aggregate of all machines, however, must result in a commission return to the Postal Service. Bids that do not provide for an aggregate commission return shall be rejected as nonresponsive.
- (g) After making the computations above, the following formula will be used to determine the offer that is most advantageous to the Postal Service:

Sum of the estimated sales in (a) above times 80%,

Less: Sum of the commissions in (d) above times 20%,

Equals: Score for offer evaluation purposes.

The contracting officer issued two amendments to the solicitation. Amendment A01, issued on August 16, 1990, requested an expansion of service which would include "a limited hot meal service similar to airline service - frozen meals to be heated as required for lunch/dinner." It further requested that each offeror's proposal include as a separate item a minimum of two pre-prepared frozen meals consisting of a meat and vegetable as well as the prices for each of these frozen meals.

On August 21, 1990, Amendment A02 was issued to cancel Amendment A01 in its entirety and to clarify the food vending service required at the Federal Way Bulk Mail Center. Amendment A02 made reference to pages 9 and 11 of the solicitation and instructed the offerors to delete several items found on these pages and to add other items as follows:

Reference page 9 of 36, PS Form 7295 of the above ref. sol.:

DELETE: SALAD BAR

ADD: VENDED SALADS

DELETE: SOUP URNS, HEATED

ADD: SOUP/CHILI VENDING MACHINE

DELETE: FREEZER, LG (FOR FROZEN MEALS)

DELETE: CONVECTION OVEN, LG (FOR HEATING FROZEN MEALS)

ADD: COMMERCIAL MICRO-WAVE OVEN

(This is in addition to micro-wave ovens
requested on page 10, of referenced solicitation.)

Page 11a of the solicitation similarly asked offerors to delete "salad from salad bar" and "soup/chili from soup urn" and to add "salads from vending machine" and "soup/chili from vending machine."

Proposals were received from five offerors: Canteen, Tac-Matic Vending, Inc. ("Tac-Matic"), Service America Corporation ("Service America"), Rainier Vending Company ("Rainier Vending"), and Holiday, the incumbent contractor. The evaluation of these offers, based on the formula specified in the solicitation, was as follows:

	Estimated Total Annual Sales	Estimated Total Annual Commission	Offer Evaluation Figure
Holiday	\$31,257.00	\$1,596.25	\$24,686.35
Tac-Matic	\$32,823.70	\$3,265.00	\$25,605.96
Service America	\$33,209.00	\$1,397.56	\$26,287.64
Canteen	\$38,014.00	\$4,033.20	\$29,604.56
Rainier Vending	\$39,699.60	\$2,450.36	\$31,269.61

After reviewing these figures, the contracting officer determined that Holiday's offer was the most advantageous to the Postal Service since Holiday received the lowest evaluation figure. Canteen's proposal was the fourth most advantageous. On September 27, Holiday was awarded the contract for a three-year period effective October 9. On October 4, Canteen met with the contracting officer to discuss Canteen's and Holiday's proposals. Canteen filed this protest with the contracting officer on October 5.

The protest raises four basic issues. First, Canteen claims that "Amendment A02 which was sent to bidders and which supposedly canceled A01, in reality canceled items that were already stated in the request for proposal, dated August 15, 1990." Canteen contends that Amendment A02 should have canceled only the items that were mentioned in Amendment A01: frozen meals. Instead, Canteen argues, Amendment A02 also improperly made changes with respect to other items in the original solicitation such as salad bars, heated soups, and convection ovens.

Second, Canteen claims that Holiday will not be able to vend sandwiches for the retail prices of \$.30, \$.35, \$.40, \$.45 and \$.50 it quotes in its offer. Canteen also alleges that "it is impossible for them to vend candy bars for \$.20" and that it is unfair to use these selling prices as a fair bid comparison.

Third, Canteen notes that it was not awarded the contract even though it quoted a profit rate of 4%, while its competitor, Holiday, quoted a higher rate of 4.5%. Canteen asserts that "some evaluation should be made in the awarding process as to the profit a vendor will be receiving."

Finally, Canteen contends that it should have been awarded the contract since its commissions were more advantageous to the Postal Service than those quoted by

Holiday. Canteen gives several examples of this: Canteen quoted a 20% commission on canned beverages, a 25% commission on coffee, and a 36% commission on candy. Holiday, on the other hand, quoted a 5%, 10%, and 20% commission on each of the items respectively.

Service America submitted comments arguing that Holiday underrepresented its previous annual sales figures,^{1/} making it difficult for prospective offerors to evaluate the solicitation properly.

Tac-Matic also submitted comments and believes that, based on its own sales records during a prior contract, Holiday has underrepresented its sales by at least one-half. In addition, Tac-Matic states that it does not understand how Holiday could lower its prices as much as it did in this offer and that it doesn't believe that Holiday will be able to operate with these low prices for very long.

Holiday submitted comments stating that it is able to offer lower prices as a result of the minimal capital outlay it had to make. Holiday explains that the capital outlay is a large part of the investment in any contract, and that, unlike its competitors, it did not have this large expense since it made this investment during the last contract. Holiday also explains that its company is smaller than some of its competitors and, therefore, operates with lower overhead costs. Holiday further maintains that "[i]n the past, instead of raising prices, commissions have been reduced with [the Bulk Mail Center's] approval to maintain constant benefit to the staff and employees." Finally, Holiday asserts that a break area has also been closed, thereby reducing sales.

In his report to this office, the contracting officer states that Amendment A02 was issued to cancel Amendment A01 in its entirety and to correct page 9 of the solicitation. The intent of Amendment A02, according to the contracting officer, was to eliminate the airline-type service which was requested in Amendment A01. The decision not to offer a hot meal service was made after considering the fact that this type of food operation bordered on a cafeteria-type service which could put the Postal Service in the position of having to pass a health department inspection in the future. The items deleted in Amendment A02 were those items that were required for an airline-type service.

In response to Canteen's claim that Holiday cannot sell candy or sandwiches for the prices it quotes, the contracting officer states that the prices which Canteen lists are incorrect. Holiday's actual best and final prices on sandwiches were \$.30, \$.40, \$.55, \$.80, \$1.20, not \$.30, \$.35, \$.40, \$.45, \$.50. Similarly, Holiday's quoted price for candy was not \$.20 as Canteen asserts in its protest, but a range of \$.15 to \$.45.

With respect to Canteen's lower profit rate, the contracting officer notes that a vendor's profit is not considered in determining award. This information is gathered in order to aid

^{1/}Apparently, the "estimated annual vends" figures which were provided for each item that was requested in the solicitation were based on Holiday's sales figures for the past five years. Offerors were explicitly advised in the Solicitation Instructions on page 37 that "[e]stimated annual vends are used for evaluation of contract award ONLY. They may or may not be indicative of past usages and are no guarantee of estimated sales."

the contracting officer in deciding whether or not a request for an increase in prices is reasonable in light of the vendor's profit margin.

Finally, with respect to Canteen's protest concerning its higher commissions, the contracting officer notes that the formula used to determine the offer that is most advantageous to the Postal Service is based 80% on sales and 20% on commissions.

Canteen submitted additional comments in response to the contracting officer's report. Canteen states that two of its employees, along with a Postal Service representative, toured the Bulk Mail Facility on November 1.

During this tour it was noted that Holiday Service, Inc. has never provided this facility with sandwiches for \$.30, \$.40, \$.55 or \$.80. In fact the lowest selling price by Holiday for sandwiches is \$1.25 compared to Canteen's bid of \$.75. It also was confirmed in touring the facility that there was [sic] no candy bars selling for \$.15, as a matter of fact, all candy bars were selling for \$.45, the same as Canteen's bid.

Canteen further alleges that Holiday's failure to comply with the prices it offered in its proposal and on which it was evaluated is unethical and highly improper.

Discussion

Insofar as Canteen is protesting the terms of Amendment A02, its protest is untimely.^{1/} Amendment A02 was issued on August 21. Proposals were due on September 11. "Protests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." PM 4.5.4.b. See Wayne S. Davis, P.S. Protest No. 90-54, October 18, 1990; Daniel J. Keating Construction Company, P.S. Protest No. 89-92, March 1, 1990. Any ambiguity in Amendment A02 was apparent to Canteen before the time set for the receipt of proposals, and this aspect of its protest is therefore untimely.

As to Canteen's allegation that Holiday cannot sell sandwiches or candy for the prices it quotes in its offer, Canteen lacks standing to raise this issue. In order to raise an issue in a protest, a protester must be an interested party. PM 4.5.2 a. The test to determine whether a protester is an interested party is "whether the protester would be eligible for award of the contract if the protest were upheld." Compu-Copy, P.S. Protest No. 90-21, July 5, 1990, quoting Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985. Even if Canteen's protest were upheld, it would not receive award since Tac-Matic was the company who made the second most advantageous offer. Therefore, Canteen lacks standing to raise this issue concerning Holiday's offer.

However, we note that, in general, the fact that an offeror "has bid too low and may suffer a loss if awarded the contract is not, of itself, sufficient grounds for not awarding

^{2/}Although no party to this proceeding has raised the issue of timeliness, we may do sua sponte since it affects the jurisdiction of our office to adjudicate Canteen's allegations. See Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990.

the contract to the low bidder." Lightron of Cornwall, Inc., P.S. Protest No. 84-6, February 27, 1984. The record in this case demonstrates that the contracting officer applied the formula specified in the solicitation and determined that Holiday's offer was the most advantageous to the Postal Service. This office will not substitute its judgment for that of the evaluators or disturb the evaluation of a proposal unless it is shown to be arbitrary or in violation of procurement regulations. Service America Corporation, P.S. Protest No. 89-27, August 22, 1989; Canteen Company, P.S. Protest No. 89-15, March 22, 1989; Evergreen International Airlines, Inc., P.S. Protest No. 86-07, May 5, 1986. The record in this case does not provide a basis upon which we may conclude that the evaluation of the protester's proposals was arbitrary or in violation of procurement regulations.

Canteen contends that Holiday does not actually intend to comply with the solicitation requirements, as demonstrated by its tour of the Bulk Mail Facility in which it found that Holiday was not providing sandwiches or candy for the prices it quoted in its offer. The question whether Holiday will or will not comply with the solicitation requirements is a matter of contract administration and is not properly before our office in a protest proceeding.^{1/} Transnorm System Inc., P.S. Protest No. 90-58, October 26, 1990; Nelson Window and Glass Company, P.S. Protest No. 86-44, July 25, 1986.

Canteen's concern with the fact that it was not awarded the contract, even though it quoted a higher profit rate than Holiday, is not well-founded. The evaluation formula does not take into account a vendor's profit margin, which is gathered in order to monitor whether or not a request for increase in prices is reasonable in view of the profit margin. Therefore, Canteen's profit margin was not relevant in determining who would receive award.

Finally, Canteen's assertion that it should be awarded the contract, since the commissions that were quoted by Canteen were more advantageous to the U.S. Postal Service than those quoted by Holiday, is mistaken. The solicitation provided a formula based on both selling price and commission, consisting of 80% of the estimated sales minus 20% of the commissions, on which award would be made. It was clear that the amount of commission would be secondary in importance to the selling price. Therefore, there is no basis for Canteen's conclusion that award should have been made to the offeror who offered the highest commission.

^{3/}Canteen's and Tac-Matic's contentions that Holiday will not be able to provide sandwiches and candy at such exceptionally low prices is also an objection to the contracting officer's affirmative finding of responsibility. This affirmative determination that an offeror is responsible will not be disturbed in the absence of fraud, bad faith, or failure to apply definitive responsibility criteria. EDI Corporation, P.S. Protest No. 83-51, January 26, 1984. Since no party has alleged that any of these conditions exist, we will not disturb the contracting officer's affirmative finding of Holiday's responsibility.

The protest is dismissed in part and denied in part.

William J. Jones
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Office of Contracts and Property Law
[checked against original JLS 6/25/93]